In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-348

ROBERT E. RATH, PERSONALLY, AND FOR BUCKEYE PAINT & VARNISH COMPANY (DEFUNCT), SEAWAY HARDWARE & MFRS' SUPPLY CO., INC. (DEFUNCT), PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

ORDER BELOW

The order of the United States Court of Claims (Pet. 11) is not yet reported.

JURISDICTION

On April 2, 1971, the Court of Claims dismissed petitioners' suit. The petition for writ of certiorari was filed on June 28, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the Court of Claims properly dismissed the suit for failure to state a cause of action within the jurisdiction of that court.

STATUTES INVOLVED

The pertinent provisions of 28 U.S.C. 1346(a)(1) and 28 U.S.C. 1491 are set forth in the petition (pp. 2-3).

STATEMENT

The government asserted deficiencies in income taxes against petitioner and his wife for the years 1960 through 1962 and 1964. Thereafter, the government made jeopardy assessments under Section 6861(a) of the Internal Revenue Code of 1954, and pursuant thereto levied upon and seized certain properties belonging to petitioner. Some of the properties were sold and the proceeds were applied against the assessed deficiencies.[1]

Petitioner then filed a petition in the Court of Claims seeking damages from the government of $508,102. The petition alleged that petitioner was damaged by:

A. Illegal misapplication of jeopardy assessment, summary collection action, expropriation, and seizure under Section 6861, 6211, and 6213 (a) of the 1964 [sic] Internal Revenue Code,

[1] The foregoing facts are not reflected in the records. We do not believe that there is any dispute as to these facts, and have set them out here for the convenience of the Court.

and contrary to law when no proper evidence of jeopardy existed.

B. Failure to abate the jeopardy liens when conditions of Section 6861(g) and 6863(b) had been met, thus forcing destruction of taxpayer's businesses as outlined in Schedule "A".

C. Negligent mishandling, impairment of contracts, and injurious failure to protect taxpayer's property rights under seizure in violation of Article 1, Sec. 1, U.S. Constitution.

The damages specified in Schedule A[2] consisted of losses due to the interruption of petitioner's business resulting from the jeopardy assessment seizure of assets alleged to have been essential to the operation of the business, and from the alleged negligent manner in which the Internal Revenue Service managed and disposed of the seized properties. Prior to filing the petition in the Court of Claims, petitioner sought review of the asserted deficiencies in the Tax Court, and his suit there was pending when he filed the petition in the Court of Claims.

The government filed a motion to dismiss the Court of Claims' petition for failure to state a claim within that court's jurisdiction. The motion was granted without opinion (Pet. 11).

ARGUMENT

The dismisal by the Court of Claims was correct, and there is no conflict or other basis for further review by this Court.

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[2] A copy of Schedule A is attached as an Appendix, *infra*.

1. Petitioner asserts that the Court of Claims has jurisdiction under 28 U.S.C. 1491[3] on the theory that he was denied due process of law deprived of his property without just compensation (Pet. 7-9), and that his claim arose from an implied contract (Pet. 10).

(a) Petitioner contends that the manner in which the jeopardy assessment was made violated his due process rights under the Fifth Amendment because there was insufficient evidence to warrant such action.[4] Petitioner cites no authority for the proposition that any quantity or type of evidence is a prerequisite to such action. On the contrary, it has been consistently held that the grounds for making a jeopardy assessment are not subject to judicial review. 9 Mertens, *Law of Federal Income Taxation* (Rev.), § 49.145; see also *Phillips* v. *Commissioner*, 283 U.S. 589. The summary nature of the administrative tax collection procedure does not violate due process rights, since the taxpayer is afforded a subsequent opportunity to contest his tax liability and recover

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[3] In our view, the claims made in the petition filed in the court below sound only in tort. The Court of Claims lacks jurisdiction over such claims (28 U.S.C. 1491), and hence the court properly ordered dismissal.

[4] Petitioner also complains (see Pet. 8) that he was not given an adequate opportunity to contest the government's actions. The summary procedures by which the government sought to collect the taxes allegedly owed by petitioner have been repeatedly upheld; there is no requirement for prior notice or hearing, since there is ample opportunity for later determination of legal rights. See *Phillips* v. *Commissioner*, 283 U.S. 589.

any excess amounts collected by the summary procedures.

So far as petitioner's complaint is based on the propriety of making the jeopardy assessments against him, the only question is one of timing. The summary procedures are undoubtedly available to the government at some point in time; the jeopardy assessment procedures under Code Section 6861(a) merely withdraw the temporary protection that Code Section 6213(a) grants a taxpayer from the usual summary collection procedures. Since the summary procedures do not offend due process requirements (*Phillips* v. *Commissioner*, *supra*), petitioner's contentions do not raise a constitutional issue, but instead only a question concerning proper application of the jeopardy assessment provisions of Section 6861(a).

(b) Petitioner also contends (Pet. 8-9) that his property has been taken without just compensation in violation of the Fifth Amendment. He has not, however, alleged facts to support this assertion. As for his property that was applied to satisfy the jeopardy assessment, the constitutionality of the jeopardy assessment procedures was sustained in *Phillips*. With respect to the allegations that other property has been lost through conduct of Revenue Service officials, there was no property taken for public use by this occurrence. See *Catalina Properties, Inc.* v. *United States*, 166 F. Supp. 763.

(c) Petitioner contends that he is entitled to recover under an implied contract by which the government must reimburse him for any loss of value to the seized property resulting from the negligence

of the Internal Revenue Service. This Court has ruled that the term "implied contract" in jurisdictional statutes covers only contractual agreements implied in fact, and not those implied in law. *Alabama* v. *United States*, 282 U.S. 502, 506; *Baltimore & Ohio R. Co.* v. *United States*, 261 U.S. 592, 597-598. Petitioner's contention is that an implied promise to reimburse arises by reason of the mere fact of a levy under a jeopardy assessment—a proposition that would run in favor of every taxpayer subjected to jeopardy assessment. This plainly would be "a promise * * * imputed to perform a legal duty" (*Baltimore & Ohio R. Co.* v. *United States*, *supra* at 597), and thus a contract implied in law as to which the Court of Claims has no jurisdiction.

2. Petitioner's reliance upon 28 U.S.C. 1346 (Pet. 10) is also in error. He has not stated a claim which comes within the tax refund jurisdiction of the Court of Claims, since he has not alleged that he filed a timely claim for refund, a jurisdictional prerequisite imposed by Section 7422(a) of the Code. *United States* v. *Felt & Tarrant Mfg. Co.*, 283 U.S. 269, and *Pacific Mutual Life Ins. Co.* v. *United States*, 44 F. 2d 887. Moreover, petitioner was litigating his tax liability for the years in question in the Tax Court at the time he filed his petition in the Court of Claims. Under these circumstances, a suit for tax refund in any other court is barred by Section 6512(a) of the Code. At all events, petitioner's claim is not within 28 U.S.C. 1346, since he does not seek a refund of taxes, but rather damages for the alleged diminution of the value of property.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FRED B. UGAST,
Acting Assistant Attorney General.

PHILLIP R. MILLER,
THEODORE PEYSER,
IRA MARK BLOOM,
WILLIAM A. FRIEDLANDER,
Attorneys.

AUGUST 1971.

APPENDIX

SCHEDULE "A"

LOSSES ATTRIBUTABLE TO MALFEASANT APPLICATION OF JEOPARDY ASSESSMENTS UNDER SEC. 6861, 6211, AND 6213(a) (1954 I.R. Code), AND UNREASONABLE NEGLIGENCE IN CARE AND PROTECTION OF CONSTITUTIONAL PROPERTY RIGHTS OF TAXPAYER WHILE UNDER SEIZURE, EXPROPRIATION AND LIQUIDATION.

A. By Seizing receivables due from defendant's principal [sic] customers, and subsequent failure to abate jeopardy liens as required under Sec. 6861(g), said customers were enjoined from making any further payments for merchandise forcing destruction of the taxpayer's businesses, and a chain reaction of other losses. This irreparable damage based upon a reasonable net profit estimate of 8% of gross on the last full year of operations (1964) calculates to a net loss to taxpayer, before taxes, for 5 years ending 1-1-1970 of $400,000.00

B. The above sections caused inexorable chain reactions, i.e. insufficient gross revenue to support fixed investment costs, organization costs, and particularly, forced loss of leases and unrecoverable losses of fixed leashold [sic] improvements, forced liquidation, foreclosures, and virtual abandonment or scrap sale of undepreciated manufacturing equipment and machinery which was undepreciated but could not be salvaged from high moving or staorage [sic] costs. The net losses attributable to acquisition by default to landlord and abandonment $36,000.00

C. Seizure and sale of defendant's motel (Rancho del Mar, Ocean Blvd. at N 36 St., Fort Lauderdale, Florida) was forced by mortgage pressures, and off-season timing in a buyer's market sale to be sold at a liquidation loss based on subsequent resale records in the following year. This net loss sustained by unreasonable government force $25,000.00

D. An enforced one-year delay, by unnecessary procedural red tape effected by the IRS, of a consummated sale of 3 story brick, commercial, warehouse and apartment building with elevator service at Broadway & Summit Sts, Toledo, Ohio forced loss of rental income to taxpayer for and [sic] entire year, plus losses of furniture, equipment and fixtures unaccounted for an [sic] beyond the control of the taxpayer $4,760.00

E. Property at Lake George, Michigan, Seaway Hardware's sawmill, yard and hardware store, was sold by IRS at public auction sale in 1966. Although no proper accounting has ever been rendered, and [sic] International Harvester bulldozer, an Oliver bulldozer, a J.I. Case Tractor and front-end loader, a rebuilt Houser mobile crane with special log equipment, a new deisel power unit, a Towmoter forklift truck with pneumatic tires, a tractor-flat bed triler [sic] rig, and three trucks, a large body of inventory from both the mill and store, store and office equipment and fixtures, a complete electrified sawmill and log ways, in metal buildings were sold without reasonable accounting or prevention of negligence. The estimated loss from sale below the actual investment costs $9,000.00

F. Seizure of taxpayer's store and yard at Soth [sic] Main St., South Bend, Indiana was so callously mishandled that while abandoned, the property was vandalized with destruction of a Ford pick-up truck, a 6000 gallon tank truck trailer, pumping, valving, storeage [sic] and filling equipment, fixtures, inventory and supplies; *plus* leaving property unprotected while under seizure and open to winter elements (after valdalizing [sic]) which caused freezing of plumbing and heating equipment, bursting of pipes and flooding, forcing property's sale as "pilfered and destroyed" assets. Net negligence loss estimated $9,200.00

G. Thorobred horses from defendant's horse-breeding and racing stable business were placed under lien, but not seized for livestock care, even though the government knew that taxpayer was without funds to maintain them. Thus they were fed and boarded by others in whose care they were, at the time, with deduction of billings to their value plus other assets, to the extent that they were sold either by the government or boarders and trainers without any kind of accounting to the taxpayer in spite of repeated efforts to secure an accounting from either of the parties involved. Estimated loss (although immeasurable) $10,000.00

H. Insurance values covering the life of the taxpayer, tied into pension and retirement plans approved by the IRS as funding collateral, were lost by default beyond the control of the taxpayer; Except for estimated cash reserve values which are estimated, the net loss to taxpayer by the destruction of the plans thus forced $22,000.00

I. Seaway Hardware payables, guaranteed by the credit of Buckeye Paint Co., had to be paid by the latter to avoid suit seizure of Buckeye funds as follows: A Detroit Steel Strapping Company $6,600.00; a Minneapolis Solvent & Chemical Corp., $4,100.00. Payroll and small purchases and supply checks made good by a taxpayer personally because of NSF condition resulting from bank seizures without regard to checks outstanding—$442.00. Settlement of a suit by creditor of Rancho del Mar Motel a/c seizure of motel bank account—$3000.00.

Net Total Personal loss, Item I $14,142.00

Net total losses negligently forced by malfeasant, misapplication of Sec. 6261 (Jeopardy Assessment) .. $508,102.00

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